United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

74-2630

In the

UNITED STATES COURT OF APPEALS

for the Second Circuit

NEW YORK PATHOLOGICAL AND X-RAY LABORATORIES, INC.; BRUCE E. RAPKINE; and SAMUEL RAPKINE,

Plaintiffs,

v.

IMMIGRATION AND NATURALIZATION SERVICE; LEONARD T. CHAPMAN, Commissioner, Immigration and Naturalization Service, in his official and personal capacity; JAMES T. GREENE, Deputy Commissioner, Immigration and Naturalization Service, in his official and personal capacity; NORTHEAST REGIONAL OFFICE, Immigration and Naturalization Service; SOCRATES P. ZOLOTAS, Regional Commissioner, Northeast Regional Office, Immigration and Naturalization Service, in his official and personal capacity; DISTRICT #3, NEW YORK CITY DISTRICT OFFICE, Immigration and Naturalization Service; SOL MARKS, District Director, District #3, New York City District Office, Immigration and Naturalization Service, retired, in his official and personal capacity; JOHN DOE, District Director, District #3, New York City District Office, Immigration and Naturalization Service, in his official and personal capacity,

Defendants.

On Appeal from the United States District Court
for the Southern District of New York

REPLY BRIEF OF APPELLANTS

NEW YORK PATHOLOGICAL AND X-RAY LABORATORIES, INC.; BRUCE E. RAPKINE; and SAMUEL RAPKINE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES CITED

INTRODUCTION

This Reply Brief is submitted to correct certain statements alleged by the Service to be fact, and to provide additional argument to the Court upon relevant issues discussed in the Service's Brief.

SUPPLEMENTAL STATEMENT OF FACTS

New York X-Ray believes that certain statements of alleged fact made in the Service's Brief are incomplete and inaccurate, as follows:

1. The new list of facilities promulgated by the Service and distributed to aliens commencing August 1, 1973, did not contain the names of civil surgeons. It listed only laboratories. Compare Brief of Appellees, pp. 3, 4.

2. The Service has failed to refute with specific information given under oath the specific allegations of New York X-Ray (Verified Complaint, pp. 5-A, 6-A; Plaintiff's Affidavit, pp. 13-A, 14-A) that some of the laboratories licensed by the Service as of August 1, 1973, failed to meet the criteria required by the Service. Compare Brief of Appellees, p.5.

3. The Service does not dispute New York X-Ray's contention that subsequent to excluding New York X-Ray from the approved list, the Service has accepted test results submitted by New York

Supplemental Statement of Facts

X-Ray to various of the Service's districts in New YOrk State and other states, except Appellee District #3. See Appellants' Brief, pp. 2, 3.

4. On August 16, 1974, New York X-Ray filed Interrogatories and requests for the production of documents. (Certified Docket Entries, 74 Civ. 3011). The pleadings sought to elicit the exact procedure by which the Service decided to deny New York X-Ray a license and to detail precisely how, in the Service's opinion, New York X-Ray failed to meet the Service's new criteria for a license to examine aliens.

After receiving an extension of time to answer these pleadings, the Service declined to respond because it alleged exemption from response pursuant to the Freedom of Information Act. 5 U.S.C. §552 (1967). The Service stated that it would move for a protective order excusing its response. Compare Appellees' Brief, p. 11, n. 2.

5. New York X-Ray does not allege, as the Service suggests, that the Service has no miscellaneous writings outlining the process used to approve laboratories for the new list, which the Service calls "a record". New York X-Ray does allege that no formal record exists, as required and described by the Administrative Procedure Act and generated pursuant to the procedures outlined in the Act. (5 U.S.C. §§556, 557, pp. 18-A, 19-A).

The Service does not acknowledge the existence of such a required formal record, developed upon hearings and the

Supplemental Statement of Facts

submission of evidence; instead, it circuitously alleges that New York X-Ray assumed the non-existence of some records. Compare Appellees' Brief, p. 11, n. 2.

6. New York X-Ray's Verified Complaint, ¶18 at p. 5, states that New York X-Ray employs a radiologist. In its Affidavit of July 23, 1974, ¶2, submitted to the Federal District Court at its hearing, New York X-Ray explained that such radiologist was Dr. Milton Zurrow, M.D. New York X-Ray states that upon information and belief Dr. Zurrow has practiced medicine for more than thirty years.

Noting that 8 C.F.R. 234.2(b) and 8 U.S.C. §1224 (p. 16-A), require a physician who conducts examinations of aliens to have practiced medicine for only four years, it is untrue that New York X-Ray admitted "not having a qualified surgeon on its staff", and it is unbecoming of an agency of the United States to allege such an admission. Compare Appellees' Brief, p. 14.

7. New York X-Ray's Affidavit, at ¶4 (pp. 12-A, 13-A) explains that the Service did make direct referrals of aliens to New York X-Ray prior to the existence of the Service' new list. This Affidavit states the name of the Service's employee who made direct referrals, it explains the circumstances of such direct referrals, and it describes the type of examinations which the Service requested New York X-Ray to perform, including some tests in addition to the standard x-ray and serology examinations.

The Service has not placed on the record any sworn

Supplemental Statement of Facts

testimony to refute these specific sworn statements of New York X-Ray. Compare Appellees' Brief, p. 12, where for the first time, and absent an oath, the Service makes only a general denial of referrals by the Service to New York X-Ray.

ARGUMENT

I. APPELLEES HAVE FAILED TO JUSTIFY THEIR DISREGARD OF THE ADMINISTRATIVE PROCEDURE ACT AS THEY REGULATE AND PREVENT APPELLANTS' CONDUCT OF THEIR BUSINESS.

Throughout its arguments, the Service has attempted to divert attention from the fact that its amendment of 8 C.F.R. 234.2(b) was designed to and did in fact regulate laboratories such as New York X-Ray. Having violated the Administrative Procedure Act, the Service now seeks to obscure the real issue in this case by alleging that it makes no difference to an alien whether he is examined by a government or by a private physician and that, therefore, no substantial change in the Service's policy occurred upon the amendment of its regulation. (Appellees' Brief, p. 8).

Several things belie the Service's position. In its Memorandum (p. 15-A), the Service states that the Attorney General issued 8 C.F.R. 234.2(b) in order to regulate clinics; and the regulation as amended added the word "clinic" in three places. No change occurred in the use of the phrase "civil surgeons". (Appellees' Brief, pp. 6, 7; 8 C.F.R. 234.2(b), p. 16-A). Civil surgeons were mentioned in the regulation before its amendment. Finally, the list of newly licensed facilities issued by the Service did not contain the name of any individual surgeons. It listed only laboratories.

There is only one logical and reasonable conclusion which may be drawn from these facts. The Service specifically

Argument I

intended to regulate laboratories and did regulate laboratories. Any discussion regarding the regulation of aliens or the regulation of civil surgeons is irrelevant to the real issue in this case, to wit: Was the Service's regulation of laboratories, such as New York X-Ray, accomplished legally in all material respects.

The Service proposes that the "impact test" be used to determine if an agency's actions constitute substantive rule-making thereby necessitating adherence to the Administrative Procedure Act. (Appellees' Brief, p. 9). The Service relies in particular upon Lewis-Mota v. Sectary of Labor, 337 F.Supp. 1281 (S.D. N.Y. 1972), rev'd., 469 F.2d 478 (2d Cir. 1972), for this proposition. Although the Service contends that Lewis-Mota was reversed on other grounds (Appellees' Brief, p. 9), New York X-Ray contends that the case was reversed for exactly the reason that the District Court's determination should be reversed in this case.

Judge Oakes noted that as a result of agency action, Appellants were required to meet new, more difficult standards in order to receive approval to enter the country. Therefore, the amended regulation did in fact change existing rights and obligations. This change of rights and obligations constituted the substantial impact which mandates "notice and opportunity for comment" prior to enactment of the regulation. Lewis-Mota, at 482.

As a result of the Service's amendment of 8 C.F.R. 234.2(b), New York X-Ray is required to meet newly prescribed standards in order to be approved and licensed by the Service to conduct examinations of aliens. The Service, therefore, must act in

Argument I

conformity with the Lewis-Mota decision upon which it relies.

Lewis-Mota, also states New York X-Ray's argument that the label placed by an agency upon its own action is not determinative of whether the agency must comply with the Administrative Procedure Act. (Appellants' Brief, p. 8). "[R]ather it is what the agency does in fact" which determines the nature of its action. Id, at 481-82. See Columbia Broadcasting System v. United States of America, 316 U.S. 407, 416 (1961), which was noted in Lewis-Mota and cited by New York X-Ray in its Brief at p. 8 and in its Memorandum to the Federal District Court, at p. 40.

The Service attempts to distinguish this case from Blackwell College of Business v. Attorney General, 454 F.2d 928 (D.C. Cir. 1971). It is the Service's theory that New York X-Ray never received previous approval of the Service to conduct examinations, which approval was thereafter revoked; whereas, the Service says Blackwell College did have previous approval which could not be withdrawn except in conformity with the Administrative Procedure Act. (Appellees' Brief, p. 10).

As noted in New York X-Ray's Affidavit, at ¶4 (pp. 12-A, 13-A), the Service did grant approval to New York X-Ray to examine aliens prior to August 1, 1973, and the effort by the Service to deny such approval by noting that no physical list existed is misleading. (Appellees' Brief, p. 10). What matters in this case is that the Service made direct referrals of aliens to New York X-Ray prior to August 1, 1973, thereby approving New York X-Ray for such examinations. The Service has not contested

Argument I

these sworn allegations with opposing affidavits. Regarding the issue of approval, our case is on all fours with Blackwell.

The Service has also attempted to establish that Blackwell was cited by New York X-Ray only in support of the publication provisions of the Administrative Procedure Act, an issue not raised in the case, and, therefore, that Blackwell provides no help to New York X-Ray's position. (Appellees' Brief, pp. 10, 11). Such reasoning by the Service reveals a fundamental misconstruction of both New York X-Ray's position and Blackwell.

New York X-Ray has always alleged, on the one hand, that the Service's violation of the publication provisions of the Act illegally revoked New York X-Ray's right, as it existed prior to August 1, 1973, to examine aliens, and that the Service's violation of the licensing provisions of the Act, on the other hand, illegally denied New York X-Ray the newly regulated right to examine aliens after August 1, 1973. By virtue of the amendment of 8 C.F.R. 234.2(b), the Service issued a rule which revoked the right of any laboratory, including New York X-Ray, to examine aliens without the Service's approval. The issuance of such a rule required compliance with the publication provision of the Act. By virtue of creating a list of laboratories approved by the Service to conduct examinations, the Service engaged in licensing activity requiring conformity with the Act.

Blackwell is entirely relevant upon the issue of licensing procedure pursuant to the Administrative Procedure Act. "License" is defined by the Act to include "the whole or a part

Argument I

of an agency permit...[or] approval". (5 U.S.C. §551(8), p. 17-A). And "licensing" is defined to include the "agency process respecting the grant,...denial,...[or] withdrawal...of a license". (5 U.S.C. §551(9), p. 17-A). New York X-Ray alleges that it was illegally denied a license in violation of the Act. Blackwell College alleged that its license was illegally withdrawn in violation of the Act. The requirements of the Act found in 5 U.S.C. §§556-58 (pp. 18-A, 19-A) apply equally to a grant or a withdrawal of a license; each constitutes "licensing" activity.

Consequently, New York X-Ray is entitled to the same benefits under the Act as Blackwell College received. Failure of the Service to observe the Act constitutes the imposition of a "sanction", defined by the Act as "the whole or part of an agency...requirement, revocation or suspension of a license...". (5 U.S.C. §551(10)(F), p. 17-A). The imposition of such a "sanction", without observing the Act was declared illegal in Blackwell, supra.

The Service contends that the licensing provisions of the Administrative Procedure Act are not applicable in this case because no license is "required by law" in order that a laboratory be allowed to submit examination results to the Service. (Appellees' Brief, p. 11). On the other hand, the Service states that 8 C.F.R. 234.2(b) was amended to "prescribe the terms of the selection of...clinics employing qualified surgeons to conduct medical examinations of aliens". [Emphasis supplied]. (Defendants' Memorandum, p. 15-A). When this admission of the intent to license is read with the

Argument I

Administrative Procedure Act definition of a "license" which includes agency "approval" (5 U.S.C. §551(8)), it becomes an inescapable conclusion that the Service has required licenses of those laboratories which have submitted examination results to Appellee District #3 since August 1, 1973. Under the circumstances, the Service must observe the Administrative Procedure Act. It is sophomoric for the Service to assert that because no "application" for a license is required by law that, therefore the Act may be violated. (Appellees' Brief, p. 11). Had the Service obeyed the law, such an application would have been required. Further, the Act requires compliance when a "license", not an application, is required by law. (5 U.S.C. §558(c), p. 20-A). If the Service's contentions are upheld, it will be free to violate the Administrative Procedure Act with impunity merely by failing to demand applications in any situation where it engages in licensing activity.

For all of the reasons stated, the Service should be ordered to obey the requirements of the Administrative Procedure Act.

ARGUMENT II

II. APPELLEES HAVE NOT PRESENTED ANY VALID ARGUMENT TO JUSTIFY THEIR DENIAL OF EQUAL PROTECTION OF LAW TO APPELLANTS.

The District Court did not acknowledge any right of New York X-Ray to equal protection of law under the Fifth Amendment. (Opinion, p. 25-A). Such a position is indefensible. Predictably, the Service has ignored this portion of the court's decision in its Brief.

Instead, the Service alleges that rights which in its discretion it once saw fit to grant, it may now deny by the mere exercise of the same discretion. And, the Service notes, though such denial may deprive a business of its clientele, such effect is nevertheless permissible because the business was only destroyed partially. (Appellees' Brief, p. 15). In support of its position the Service paraphrased the holdings of United States v. Husband R. (Roach), 453 F.2d 1054, 1063 (5th Cir. 1971).

In (Roach), the Governor of the Canal Zone sought to save the financial position of a government-franchised bus line whose labor costs had risen and which was competing with many non-franchised buses on identical routes. Therefore, the Governor amended a traffic regulation to provide that thereafter only franchised buses might use particular, heavily traveled routes. (Roach), at 1056. The prohibition of these routes to non-franchised buses was challenged by the defendant who was summoned for traveling upon a newly restricted route.

Commenting upon the government's action, the court noted

Argument II

that this case did not require consideration of circumstances where the franchised company received exclusive access to particular areas. (Roach), at 1062. Here, the court said:

> "The regulation permits any bus operator to carry on his business along the otherwise prohibited routes provided he applies for and receives a permit ..., the issuance of which is conditioned upon 'the need therefor [being]...established.' " [Emphasis supplied]. (Roach), at 1062.

The court also noted that there was no showing that the defendant had ever applied for or had ever been denied a permit; or that if such denial had occurred, the denial "lacked a rational basis for differentiation--that it was invidious." (Roach), at 1062.

(Roach) has no relevance to our case, in any material respect. The Service did not provide any laboratory the opportunity, pursuant to its amended regulation, to apply for a permit to conduct otherwise prohibited examinations of aliens. (8 C.F.R. 234.2(b), p. 16-A). In fact, the Service has maintained throughout this case that it never engaged in the process of granting licenses or permits which require applications. (Appellees' Brief, p. 11).

Furthermore, had the Service allowed New York X-Ray to apply for such a permit, pursuant to the Service's amended regulation, New York X-Ray could easily have established the fact that any differentiation between New York X-Ray and almost every one of the presently licensed laboratories was "irrational" and "invidious". New York X-Ray's Verified Complaint (pp. 5-A--10-A) and Affidavit (12-A--14-A) explain in

Argument II

specific detail how New York X-Ray meets or exceeds each of the Service's criteria for approval and how almost every laboratory presently approved by the Service fails to meet such criteria. The Service has not contested these allegations by introduction upon the record of sworn, specific denials.

The Service recommends review of Bolling v. Sharpe, 347 U.S. 497 (1954). (Appellees' Brief, p. 14). New York X-Ray welcomes the Service's reliance upon Bolling because Bolling enunciates explicitly the principle of fairness underlying New York X-Ray's right to equal protection of law under the Fifth Amendment:

> "...The concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The 'equal protection of laws' is a more explicit safeguard of prohibited unfairness than 'due process of law', and therefore we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process." Bolling, at 499.

> "In view of our decision that the Constutiton prohibits the states from [denying equal protection of law], it would be unthinkable that the same Constitution would impose a lesser duty on the federal government." Bolling, at 500.

CONCLUSION

For the reasons stated above, Appellants continue to urge this Court to reverse the order of the District Court denying Appellants the preliminary injunction, to grant Appellants a judgment declaring that their rights have been violated, and issue an injunction permanently enjoining such violations, to grant Appellants a preliminary injunction should other issues require resolution by any court or agency, and to remand this case for further hearing upon the issue of damages.

Respectfully submitted,

NEW YORK PATHOLOGICAL AND
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and SAMUEL RAPKINE

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

NEW YORK PATHOLOGICAL AND X-RAY LABORATORIES, INC., et al, Plaintiffs--Appellants, v. IMMIGRATION AND NATURALIZATION SERVICE, et al, Defendants--Appellees.	Docket No. 74-2630

AFFIDAVIT OF SERVICE

EDWARD J. CARROLL makes oath to the following:

1. I am a member of the firm of Thomas and Alexander, counsel for Plaintiffs-Appellants in the above-entitled matter.

2. I have this 16th day of April, 1975, served two (2) copies of the Reply Brief of Appellants upon counsel for Defendants-Appellees, Mary P. Maguire, Assistant United States Attorney, Southern District of New York, by depositing the same in the United States Mail, postage prepaid, addressed to her at United States Court House, Foley Square, New York, New York 10007.

Dated at Burlington, Vermont, this 16th day of April, 1975.

Edward J. Carroll

STATE OF VERMONT
County of Chittenden, SS.

Subscribed and sworn to before me this 16th day of April, 1975.

Notary Public

My Commission expires
February 10, 1978

UNITED STATES COURT OF APPEALS

FOR THE SECOND CITCUIT

Docket No. 74-2630

NEW YORK PATHOLOGICAL AND
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AFFIDAVIT OF SERVICE

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